SELCO SHIPYARD PTE. LTD.

HIGH COURT, SINGAPORE
GP SELVAM JC
[COMPANIES WINDING-UP NO. 125 OF 1986]
20 NOVEMBER 1991

LABOUR LAW: *Petition - Companies winding up - Upon the appointment of provisional liquidators the company ceased to carry on business - Liquidators find that the remaining employees each with a contract of service with the company that ceased to do business - All of them were members of an union of the said trade - Issue - under the terms of winding up of a company the salary of an employee of the said company is accorded priority over unsecured debts - The same priority is extended by the Employment Act for the payment of gratuity and other retirement benefits upon termination of service by virtue of the provisions in the collective agreement - Section 328 Companies Act (Cap. 50), s. 47 Employment Act (Cap. 91)*

Selco (Shipyard) Pte. Ltd. (Selco), a Singapore registered company was in shipbuilding and salvage business. A petition was filed to wind up Selco on 17 February 1986. Provisional liquidators were appointed for Selco by an Order of Court made on 18 February 1986. When the winding up order was eventually made on 27 June 1986 the provisional liquidators were confirmed as liquidators. Upon the appointment of provisional liquidators Selco ceased to carry on business.

The liquidators found that there were 132 employees of various trades in the employment of Selco. Each employee had a written contract of service with Selco. They were all members of the Shipbuilding and Marine Engineering Employees Union (The Union). On 19 February 1986 the liquidator by serving a standard letter terminated the services of the employees with immediate effect.

The union had a collective agreement (the collective agreement) with Selco dated 14 June 1985. It took effect on 1 January 1985 and was to remain in force until 31 March 1987.

Under s. 328 of the Companies Act (Cap. 50) in a winding up of a company the salary of an employee of the company is accorded priority over unsecured debts. Such priority is subject to a limitation of five months' salary or $6250 whichever is the lesser. Salary by statutory definition includes any amount payable to the employee in lieu of notice of termination of employment. Further s. 47 of the Employment Act (Cap. 91) extends the same priority to gratuity and other retirement benefits payable to the employee on his retirement or the termination of his services by virtue of the provisions in a collective agreement. Upon the termination of employment the union on behalf of the employees claimed notice pay, service award, annual wage supplement and retrenchment benefit. The liquidator and the union were in dispute on these claims.

Held:

[1] Section 8 and s. 10(3) of the Employment Act are inoperative when the contract of service stipulated a notice period for termination of employees. This is because of s. 10(2) of the Employment Act permits the parties to agree to the period of notice. Only in the absence of an agreement between the parties will the periods stipulated in s. 10(3) apply. Had it been the intention to make statutory notice periods in s. 10(3) to apply to all instances of termination, subsection (2) of the s. 10 would not have been included in the Employment Act.

[2] That the law makers intend to permit unfettered freedom of contract as regards the notice period is inferred from the proviso in that section which says that the right to notice may be waived altogether on any occasion. Additionally s. 8 of the Employment Act comes into operation only when a provision in the contract is in conflict with a statutory benefit. There is no such conflict in this case. The employees are entitled to only payment of salary for the notice period stated in the contract of service.

[3] The meaning of s. 47(2) of the Employment Act is clear. It implies a term into the collective agreement for retirement benefit to be paid where the employer ceases to carry on business for whatever reason and the contract of service does not provide for payment of gratuity or other sum of money in the event of the employer ceasing to carry on business. The liquidator's decision to cease business and the consequent termination is a cause contemplated by this subsection. Accordingly an entitlement for the retirement benefit or in the language of the collective agreement a "Service Award" is implied into the collective agreement.

[4] The collective agreement does not state what would happen if the company ceases to carry on business before the employee reaches the retirement age. In such circumstance s. 47(2) would imply into the collective agreement a term to the effect that proportionate annual wage supplement would be payable *pro rata* for the period from the beginning of the year until the company ceased to carry on business.

Legislation referred to:
Companies Act [Sing], s. 328
Employment Act (Cap 91) [Sing], ss. 8, 10(2), (3), 11, 47, (1), (2)

For the applicant - S. Thulasidas
For the employees of the company - Wong Boon Teck

JUDGMENT

GP Selvam JC:

Selco (Shipyard) Pte. Ltd. ("Selco"), a Singapore registered company was in shipbuilding and salvage business. It had a paid-up capital of $5,000,000. It was a member of the Pan-Electric Group. In 1985 Pan-Electric Industries Limited a public listed company and its subsidiaries including Selco encountered a financial crisis. In consequence, petitions were filed for the companies to be wound up. A petition was filed to wind up Selco on 17 February 1986. Provisional liquidators were appointed for Selco by an Order of Court made by Sinnathuray J on 18 February 1986. When the winding up order was eventually made on 27 June 1986 the provisional liquidators were confirmed as liquidators. Upon the appointment of provisional liquidators Selco ceased to carry on business.

The liquidators found that there were 132 employees of various trades in the employment of Selco. Each employee had a written contract of service with Selco. They were all members of the Shipbuilding and Marine Engineering Employees Union (the union).

On 19 February 1986 the liquidator by serving a standard letter terminated the services of the employees with immediate effect. The operative part of the letter of termination of employment read:

> We regret to advise you that the company is no longer in a position to make payments to you for services rendered or for future services; accordingly, your employment by the company is terminated with immediate effect. This development, as you may be aware, has arisen from the company's financial difficulties, and the termination of your services has been taken after careful consideration and with great reluctance.

> In accordance with the provisions of the Companies Act, Cap. 185, your entitlement, if any, to arrears of wages (or salaries) and leave pay ranks as a preferential debt. If any additional contractual payment is due to you, please submit particulars of such claims and these will be looked into by the provisional liquidators.

The union had a collective agreement (the collective agreement) with Selco dated 14 June 1985. It took effect on 1 January 1985 and was to remain in force until 31 March 1987.

Under s. 328 of the Companies Act (Cap. 50) in a winding up of a company the salary of an employee of the company is accorded priority over unsecured debts. Such priority is subject to a limitation of five months' salary or $6,250 whichever is the lesser. Salary by statutory definition includes any amount payable to the employee in lieu of notice of termination of employment.

Section 47 of the Employment Act (Cap. 91) extends the same priority to gratuity and other retirement benefits payable to the employee on his retirement or the termination of his services by virtue of provisions in a collective agreement.

Upon the termination of employment the union on behalf of the employees made the following claims:

a. Notice Pay	$104,012.10
b. Service Award	$274,433.12
c. Annual Wage Supplement	$ 18,856.62
d. Retrenchment Benefit	$918,947.96

The claim for retrenchment benefit was abandoned on the concession that termination following a winding-up order did not amount to retrenchment. The liquidator and the union were in dispute on the other three claims.

Notice Pay

Section 11 of the Employment Act enables the employer to terminate a contract of service without notice by paying the employee a sum equal to the amount of salary which would have accrued to the employee during the period of the notice. The standpoint of the liquidator is that the applicable period of notice is that stipulated in the contract of service of each employee and not what is stated in s. 10(3) of the Employment Act.

Section 10 of the Employment Act reads as follows:

(1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate the contract of service.

(2) The length of such notice shall be the same for both employer and employee and shall be determined by any provision made for the notice in the terms of the contract of service, or, in the absence of such provision, shall be in accordance with subsection (3).

(3) The notice to terminate the service of a person who is employed under a contract of service shall be not less than:

(a) one day's notice if he has been so employed for less than 26 weeks;

(b) one week's notice if he has been so employed for 26 weeks or more but less than two years;

(c) two weeks' notice if he been so employed for two years or more but less than 5 years; and

(d) four weeks' notice if he has been so employed for 5 years or more:

Provided that this section shall not be taken to prevent either party from waiving his right to notice on any occasion.

The typical contract of service provided for a flat period of 2 weeks notice irrespective of the length of service of the employee.

The argument on behalf of the employees invoked s. 8 of the Employment Act which provides:

> Every term of a contract of service whether made before or after the commencement of this Act which provides a condition of service which is less favourable to an employee than any of the conditions of service prescribed by this Act shall be illegal, null and void to the extent that it is so less favourable.

It was argued on behalf of the employees that where the applicable contractual notice period for termination was shorter than the notice period stipulated in s. 10(3) of the Employment Act the contractual provision was null and void.

The conclusion of this Court is that s. 8 and s. 10(3) of the Employment Act are inoperative when the contract of service stipulates a notice period for termination of employees. This is because of s. 10(2) of the Employment Act permits the parties to agree on the period of notice. Only in the absence of an agreement between the parties will the periods stipulated in s. 10(3) apply. Had it been the intention to make the statutory notice periods in s. 10(3) to apply to all instances of termination, subsection (2) of s. 10 would not have been included in the Employment Act. That the lawmakers intended to permit unfettered freedom of contract as regards the notice period is inferred from the proviso in that section which says that the right to notice may be waived altogether on any occasion. Additionally s. 8 of the Employment Act comes into operation only when a provision in the contract is in conflict with a statutory benefit. There is no such conflict in this case. I therefore decide that the employees are entitled to only payment of salary for the notice period stated in the contract of service.

Service Award (Retirement Benefit)

The relevant parts of cl. 35 of the collective agreement reads as follows:

> Subject to the relevant provisions of the Employment Act, the company shall pay an employee a service award if he:
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> (a) retires at the age of 55 years;
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> (b) is certified medically unfit for continued employment by the company's appointed doctor or any Government medical officer;
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> (c) dies in the service of the company, in which event, payment shall be made to his legal personal representative whose receipt thereof shall be sufficient discharge of the company's liability under this clause.

The clause contains the formula for the computation of the service award based on the length of service of the employee. It will be observed that the collective agreement does not provide for an entitlement to such retirement benefit if the employer ceases to carry on business.

Section 47(2) of the Employment Act after omission of the irrelevant parts may be recast as follows:

> Where a collective agreement contains a provision for the payment of a gratuity or other sum of money to an employee on his retirement and no provision is made for the payment of a gratuity or other sum of money on the termination of the employee's services by reason of his employer ceasing to carry on business for whatever reason, every such collective agreement or award shall be deemed to contain a provision that in the event of the employer ceasing to carry on business for whatever reason, an employee who ceases to be employed by the employer by reason of the happening of such a contingency shall be paid such sum of money as he would have been entitled to receive under the terms of the collective agreement or award if he had retired from the service of the employer on the day the employer ceases to carry on business.

The meaning of s. 47(2) is clear. It implies a term into the collective agreement for retirement benefit to be paid where the employer ceases to carry on business for whatever reason and the contract of service does not provide for payment of gratuity or other sum of money in the event of the employer ceasing to carry on business. The liquidator's decision to cease business and the consequent termination is a cause contemplated by this subsection. Accordingly an entitlement for the retirement benefit or in the language of the collective agreement a "service award" is implied into the collective agreement.

The liquidator's contention that s. 47(2) applies only to an instance where the company ceases to carry on business at the time the employee reaches the retirement age is not convincing. The effect of this argument is that the word "if" in the subsection means "provided that" or "only if". That construction cannot be right because such situation has been expressly provided for in the collective agreement and the employee is protected by s. 47(1) of the Employment Act. The subsection clearly envisages a situation which is not provided for in the collective agreement - namely an entitlement to the same retirement benefit where the employer ceases to carry on business before the employee attains the age of retirement as the employee would get upon his retirement. The word "if" in the subsection, in my view, should read "as if."

Annual Wage Supplement (13 month pay)

Clause 8(1) and (4) of the collective agreement provides as follows:

> (1) An annual wage supplement shall be paid in respect of each calendar year commencing with the calendar year 1985 on or before 31 December of the calendar year to each employee who is confirmed in his appointment as at the end of the calendar year for which the annual wage supplement is paid.
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> (4) Proportionate annual wage supplement calculated on the basis of each completed month's service in the calendar year shall be paid to a confirmed employee whose services are terminated in any of the following circumstances:
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> (a) retirement on reaching the retiring age;
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> (b) medically unfit for continued employment;
>
> (c) death;
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> (d) retrenchment;
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> (e) call up for full time National Service.

The collective agreement does not state what would happen if the company ceases to carry on business before the employee reaches the retirement age. In such circumstance for reasons stated in the preceding discussion s. 47(2) would imply into the collective agreement a term to the effect that proportionate annual wage supplement would be payable *pro rata* for the period from the beginning of the year until the company ceased to carry on business.

a The priority benefits each employee would gain is subject to the limit of five months salary or $6,250 whichever is the lesser.

Also found at [1992] 1 CLJ 742

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